

United States Senate

REPUBLICAN POLICY COMMITTEE

Larry E. Craig, Chairman

Jade West, Staff Director



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The Extraordinary Breadth of the Employment Non-Discrimination Act

The Scope of ENDA

The Employment Non-Discrimination Act (ENDA) was introduced in both houses of Congress on June 10, 1997. The Senate bill (S. 869) had 35 initial sponsors, and the House bill (H.R. 1858) had 149 initial sponsors. ENDA's stated purpose is "to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation" [2(2)].

A substantially similar (but not identical) bill of the same name was defeated by one vote in the Senate on September 10, 1996. The vote was 49 to 50 -- with 85 percent of Republicans voting *against* it and 89 percent of Democrats voting *for* it.

ENDA forbids discrimination in employment on the basis of "sexual orientation," which it defines as "homosexuality, bisexuality, or heterosexuality" whether "real or perceived" [3(9) & 4(1)]. ENDA also applies to one's associates [4(2)]. Therefore, ENDA covers --

- an individual's ***real*** (actual) homosexual orientation, bisexual orientation, or heterosexual orientation;
- an individual's ***perceived*** homosexual orientation, bisexual orientation, or heterosexual orientation (whether the perception accords with reality or not);
- the real or perceived homosexual orientation, bisexual orientation, or heterosexual orientation of **any *other* individual with whom the first individual is *believed to associate* (presently);** and
- the real or perceived homosexual orientation, bisexual orientation, or heterosexual orientation of **any *other* individual with whom the first individual is *believed to have associated* (in the past).**

ENDA covers applying, hiring, promoting, assigning, firing, compensating, training, and every other term, condition, or privilege of employment [3(5) & 4]. It covers unions and employment agencies and

public employers and every private employer who has 15 or more employees [3(2), (3), (4), (6) & 4]. Therefore, **in addition to millions of government employees in thousands of government offices, ENDA will apply to some 81 million private-sector employees who work for 730,000 companies in about 1.9 million places of business.**

ENDA's scope is extraordinary, but its words are not self-defining. The Equal Employment Opportunity Commission (EEOC) and the courts will have to answer the following kinds of questions for employers and employees:

- **What is the relationship between ENDA's rule of nondiscrimination and marriage?** Does a workplace rule that favors marriage (*e.g.*, a rule that allows only spouses to accompany employees on a three-day company retreat) discriminate on the basis of sexual orientation? Does it matter that some heterosexuals are not married (so that their disability under the rule must be based on something more than their heterosexuality)? Does it matter that some homosexuals may be married to a spouse of the opposite sex (so that they have no disability under the rule irrespective of their homosexuality)? Isn't the nondiscrimination policy of ENDA incompatible with every employment practice that recognizes or supports marriage, an exclusively heterosexual institution?
- Under ENDA, **what is the relationship between "sexual orientation" and sexual behavior?** The act speaks to "*sexual orientation*," but isn't it sexual *behavior* that is at the heart of ENDA? For example, must every employer who has religious or moral scruples about homosexuality treat the celibate or continent homosexual exactly the same as the promiscuous homosexual? Would a willingness to hire the former but not the latter be discrimination on the basis of sexual orientation in violation of ENDA? They both have the same *orientation*; it is *behavior* that the employer finds relevant.

One study "found that 43 percent of male homosexuals estimated having sex with 500 or more different partners and 28 percent with a 1,000 or more different partners. Seventy-nine percent said that more than half of these partners were strangers and 70 percent said that more than half were men with whom they had sex only once." J. Satinover, *Homosexuality and the Politics of Truth* 55 (1996), citing Bell & Weinberg, *Homosex-ualities: A Study of Diversity Among Men and Women* 308 (1978). **Won't the behavior of male homosexuals be relevant to ENDA's definition of "homosexuality"?**

- **Does "sexual orientation" include emotional, social, or political factors?** Can an employer give time off to attend a "Promise Keepers" rally but not the "Gay Pride March"? Is marching for "gay pride" part of one's "sexual orientation"? **Does "sexual orientation" encompass a person's lifestyle, speech, or dress?** If a woman shows up at work wearing a tee-shirt that says, "Lesbian Avengers -- We Recruit," can her employer send her home to change, or is her tee-shirt protected as part of her sexual orientation?

ENDA will add to the thousands of lawsuits and administrative complaints that are now being filed. Under current civil rights laws (forbidding discrimination on the basis of race, ethnicity, sex, religion,

age, and disability), **there were 23,152 cases alleging employment discrimination filed in federal district courts in Fiscal Year 1996, an increase of 115 percent from just four years earlier.** Also, in FY 1996, the **EEOC received 78,000 complaints.**
